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IN THE

Supreme Court of the United States

October Term, 1967
No. 49

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FLEETWOOD TRAILER CO., INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

Respondent accepts Petitioner's reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

Question Presented.

Whether the Court of Appeals correctly determined that the Board's finding that the positions of six economic strikers had not been absorbed or abolished was not supported by substantial evidence on the record taken as a whole?

Statement of Facts.

Respondent Fleetwood Trailer Co., Inc. (hereinafter "Respondent"), is charged with discrimination in the rehiring of six strikers (hereinafter the "complainants")

in violation of Sections 8(a)(1) and 8(a)(3) of the Labor-Management Relations Act. It is conceded that any discrimination was purely technical for the General Counsel stipulated "that there is no issue in this case as to actual discrimination against these employees aside from the issue whether the employees had been replaced prior to their reapplication for employment." [R. 21].[1] The Trial Examiner specifically found:

> ". . . [N]o Union animus is alleged or shown. I am not convinced that the Respondent had a conscious purpose to discriminate against the strikers. . . ." [R. 89].

This finding was adopted by the National Labor Relations Board [R. 94] and approved by the Court of Appeals [R. 97].

On August 5, 1964, Respondent, a manufacturer of mobile homes, had about 110 employees and was scheduling production at the rate of 20 units per week [R. 86, 39, 51, 56]. On the following day, as a result of a breakdown in collective bargaining negotiations between Respondent and the Union, about half of the employees struck in support of their contract demands [R. 96, 85, 51, 61]. It is conceded to have been an ordinary economic strike (Pet. Br. p. 8, n. 4). Upon commencement of the strike Respondent cut back its production schedule to ten units per week and reduced orders for materials accordingly [R. 97, 86, 38, 39, 51, 83].

By August 18 Respondent had hired about 20 new employees and some strikers had returned to work, so

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[1] "R" stands for the printed record herein. "Pet. Br." stands for the Brief for the Petitioner. "Am. Br." stands for the Amicus Curiae Brief.

that its work force had increased to 71, sufficient work force to produce 15 units [R. 97, 85, 56, 62]. On that date the Union ended the strike, accepted Respondent's last contract offer, and requested reinstatement of the remaining strikers [R. 97, 85, 33-34]. Respondent, however, had no openings at that time [R. 97, 85, 34, 48].

At the end of the strike it would have required a maximum of thirty days for Respondent to overcome the business problems caused by the strike and to return to pre-strike production levels [R. 100, 37-38]. However, at that time, taking into account the supply of inventory units and current production, Respondent determined not to increase employment or production [R. 100, 86, 48-49]. That Respondent's determination was made in good faith and was correct is proven by the undisputed fact that at the date of the openings here in contention, almost two months later [R. 97, 86, 58] the work force actually decreased from seventy-one employees at the end of the strike to sixty-eight employees, and production was 14 units, one less than capacity at the end of the strike [R. 52-53, 83]. Pre-strike production levels were not reached until almost five months after the strike ended [R. 100, 86, 53].[2]

During the period October 8 through October 16, Respondent filled six positions without giving preference to the complainant strikers. All the complainants were, however, hired for other positions shortly thereafter (Pet. Br. p. 6).

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[2]Petitioner suggests the Company may have maintained reduced production deliberately to punish the strikers. However, as noted above, the Trial Examiner specifically found no anti-union animus and the record shows that the Company ceased hiring August 13, five days before the meeting which ended the strike and a week before the complainants re-applied [R. 82].

The National Labor Relations Board concluded that the reduced production was only temporary and that the jobs had not been abolished. It therefore concluded that Respondent had discriminated against the complainants as unreplaced strikers [R. 94, 89].

The Court of Appeals, correctly referring to and applying the doctrine on scope of review established in *Universal Camera Corp. v. Labor Bd.* (1951), 340 U.S. 474, 487, found that the "General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a whole . . ." and held that "the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [R. 101].

Summary of Argument.

Petitioner agrees that the Respondent was not required to give preference to the complainants if their positions had been abolished. Petitioner challenges the holding of the Court of Appeals that the positions had been abolished and were only later recreated on four grounds:

1. That the Court misapplied precedent;
2. That the Court formulated an incorrect test for determining abolishment;
3. That the Court of Appeals erred in its evaluation of the evidence; and
4. That the Court of Appeals upheld the Respondent without specific evidence in the record justifying failure to give preference.

The Court of Appeals correctly relied upon *Atlas Storage Division* (1955), 112 N.L.R.B. 1175 and *National Labor Relations Bd. v. Roure-Dupont Mfg.* (2nd

Cir. 1952), 199 F. 2d 631. Petitioner would distinguish those cases simply on the ground that "the striker's job had been in effect abolished because the employer had permanently lost customers." This distinction begs the question for the issue to be determined is whether the jobs had been abolished and the Court of Appeals found specifically that "the record here indicates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated."

Petitioner contends that the Court of Appeals established an incorrect test for determining if a position has been abolished by adoption of language originally formulated by Petitioner that "whether or not a vacancy exists must be determined at the time the strikers apply for work after the strike." This quotation is taken out of context to make it appear that the Court was holding literally that if a job was not available on the day the strikers reapplied, they were forever barred from reinstatement. This language is correct when looked at in context. The question of replacement will ordinarily arise only when an employer proposes to hire someone, perhaps long after the strike, but the replacement does not occur when the new employee is hired—the rights of the striker were determined when he applied for work after the strike. Thus the statement of the Court of Appeals is literally correct, but in determining whether the position of the strikers had been abolished on the day that the strikers reapplied, the Court also correctly analyzed all the evidence including the course of business over the following five months.

In reviewing the record, the Court of Appeals, applying *Universal Camera* held that the finding of the

Board that the positions had been abolished was not supported by "substantial evidence on the record taken as a whole." This finding is correct. Two months after the strike when the new employees were hired there actually were fewer employes at the plant than at the end of the strike. Two months after the strike the plant was actually producing one less unit per week than its capacity at the end of the strike. The union business agents, fully apprised of all the facts, cooperated in implementation of a nonpreferential hiring procedure. It should be noted that at least explicitly, Petitioner does not rely on *Universal Camera.*

Petitioner, relying upon *National Labor Relations Board v. Great Dane Trailers, Inc.* (1967), 388 U. S. 26, contends that Respondent should have introduced specific evidence justifying its failure to grant preference to the "unreplaced" strikers. Respondent freely concedes that if the complainants had not been replaced, they were entitled to preference. The issue in this case, however, is whether they were replaced. Petitioner does not contend that *Great Dane* is applicable to permanently replaced strikers.

The Amicus Curiae brief urges this Court to overrule *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333, and the entire body of law which is developed under that case and hold that an employer must grant preference to strikers on new job openings, whether or not they have been replaced or their positions permanently abolished. This contention is not properly before the Court since it is not within the scope of the question presented which concerns an employer who allegedly "at all times intended to resume complete production as quickly as pos-

sible." Further, this issue was neither briefed nor decided below and the Labor Board has taken no position thereon. Decision of this question under these circumstances, it is submitted, would be improper for as this Court said in *Marine Engineers v. Interlake Co.* (1961), 370 U.S. 173, 185, "while the Board's decision is not the last word, it must assuredly be the first."

But if the Court should address itself to the issue raised by the Amicus brief, establishment of the rule therein sought would be improper because:

1. It would submit every employer who relied on the prior rule, followed "without exception" over the last thirty years, to an unfair labor practice charge and substantial liability for back pay, subject only to the statute of limitations.

2. The rule was approved by Congress in 1947 and 1959 for the legislative history shows that Congress was aware that strikers who have been replaced "have no right to reinstatement." The only amendment was to grant replaced strikers a right to vote.

3. Congress in 1947, in Section 9(c)(3) of the Act, used the term "entitled to reinstatement" indicating that Congress clearly recognized a difference in status between replaced and unreplaced strikers.

4. What the Amicus brief seeks is in fact a court imposed seniority system, an extremely sensitive area of labor relations in which it is submitted this Court should not innovate, particularly without a complete record and thorough consideration at the Board and Court of Appeals levels.

ARGUMENT.

I.

Positions of the Parties.

There is no dispute as to the fundamental principle of law applicable to this case, *i.e.*, that a striker whose job has been permanently abolished or absorbed by other employees is not entitled to reinstatement or preference as to subsequent openings. *Atlas Storage Division* (1955), 112 N.L.R.B. 1175, *enforced Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd.* (7th Cir. 1956), 233 F. 2d 233; *National Labor Relations Bd. v. Roure-Dupont Mfg.* (2d Cir. 1952), 199 F. 2d 631.[3] The Court of Appeals determined that this rule applied to the facts in this case. Petitioner disagrees with the determination of the Court of Appeals on four points:

(1) That the Court of Appeals misapplied precedent to facts;

(2) That the Court of Appeals established an incorrect test for determining if abolishment of positions had occurred;

(3) That the Court of Appeals erred in evaluation of the evidence in the record; and

(4) That Respondent had a burden to show justification why the complainants were not given preference.

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[3]See also *Bartlett-Collins Company* (1954), 110 N.L.R.B. 395, 397-398, *aff'd. American Flint Glass Wkrs. Union v. National Lab. R. Bd.* (D.C. Cir. 1956), 230 F.2d 212, *cert. denied* 351 U.S. 988; *Sax v. National Labor Relations Board* (7th Cir. 1948), 171 F.2d 769, 771.

Respondent submits that the question whether the complainants had been permanently replaced is essentially one of fact to be determined by the Board subject to the rules of review established in *Universal Camera.* Obviously whether abolishment has occurred will depend on the peculiar conditions of the particular industry and market. It seems to be precisely the situation this Court had in mind when it said:

> "Last term we made it plain that Congress charged the Courts of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.' *Labor Board v. Pittsburgh S. S. Co.,* 340 U.S. 498, 503 (1951). We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."
>
> *Labor Board v. American Ins. Co.* (1952), 343 U.S. 395, 409-410.

The Court of Appeals for the Ninth Circuit specifically decided the case under *Universal Camera.* The issue having been raised, however, Respondent will show that the Ninth Circuit decision was correct.

II.

Under All Applicable Precedent, the Complainants Had Been Permanently Replaced.

The decisions of the National Labor Relations Board, and the United States Court of Appeals clearly hold that a striker is replaced and is not entitled to reinstatement where his job has been abolished or absorbed by other employees. *Atlas Storage Division* (1955), 112 N.L.R.B. 1175, *enforced Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd.* (7th Cir. 1956), 233 F. 2d 233 is very similar to this case and correctly states the law. In *Atlas* the employees went on strike which resulted in a loss of business to the employer and, as a result, an employee's work had been absorbed by other employees. Three days after the employee applied for reinstatement, another employee was injured, but the company hired a new employee and did not notify the striker. Both the National Labor Relations Board and the Seventh Circuit Court of Appeals held that the striker had been replaced and was not entitled to the position which subsequently came open.

> "Consequently, as his job was for economic reasons either abolished or absorbed by other employees he was not entitled to reinstatement on July 27. Upon these facts, we find that Respondent did not violate the Act in refusing to reinstate him."
>
> *Atlas Storage Division,* 112 N.L.R.B. 1175, 1180.

> "As we have found that Atlas was legally justified in refusing to bargain on May 25, Rodig was an economic striker. Consequently, as his job was for economic reasons either abolished or absorbed

by other employees, he was not entitled to reinstatement on July 27. Upon these facts, we find that Atlas did not violate the act in refusing to reinstate him.

"The examiner also concluded that Rodig, even if an economic striker only, was entitled to reinstatement when, three days after the application for reinstatement, an employee was injured and could no longer work. Atlas advertised for and hired a new employee. Rodig was not notified of the job, but he saw the advertisement. Nevertheless, he did not apply.

"The Board did not agree that Atlas was under any duty to recall Rodig on July 30—the date of the employee's injury—or any time thereafter. As Rodig's employment was properly terminated when he applied for reinstatement, Atlas' duty toward Rodig did not require seeking him out but merely refraining from discriminating against him should he request new employment. However, he never made any such request.

"As to Rodig, we believe that the Board's conclusion is correct. [Citing cases.]"

Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd., 233 F. 2d 233, 238.

National Labor Relations Bd. v. Roure-Dupont Mfg. (2d Cir. 1952), 199 F. 2d 631 is somewhat different upon the facts, for the employer there contractually agreed to a preferential hiring list. However, as to four employees, an issue was whether they had been permanently replaced. The employer had suffered a reduction in business as a result of the strike and the

work of the four strikers had been done by three non-striking employees who continued to perform the work for a month after the unconditional offer to return to work. The Board had held that the replacements could "not be considered as occupying the positions permanently, but only as temporary replacements for three of the striking laboratory assistants, whose positions were therefore available for them on February 25, 1949." The court rejected this finding:

> "This conclusion does not appear to us to be supported by the evidence. The substitute employees admittedly continued their 'temporary' functions for a month after the strike ended. And the record is devoid of any evidence showing that respondent's business had become sufficiently revitalized after the strike to accommodate the employees whose positions the Board finds available on February 25. On the contrary, the evidence shows that respondent had lost a substantial amount of business because of the strike and that its operations only gradually returned to normal. Respondent is entitled to have its business condition immediately after the strike taken into consideration in connection with its obligation to reinstate strikers. [Citing cases.]"
>
> *National Labor Relations Bd. v. Roure-Dupont Mfg.*, 199 F. 2d 631, 634.

In *Brown and Root, Inc., Etc.* (1961), 132 N.L.R.B. 486, 494 the Board held that whether a striker has been replaced is to be determined on the date on which they make their offer to return to work, and they are not entitled to vacancies which arose subsequently if there

is no vacancy on the date on which they apply. The Board in this case simply ignored or dismissed these cases without discussion.[4]

Petitioner, which incidentally does cite a single lower court or Board decision on similar facts supporting its position, does not even discuss or attempt to distinguish *Roure-Dupont*. It attempts to distinguish its own precedent, *Atlas* and *Brown and Root, supra,* on the grounds that "the striker's job had been in effect abolished because the employer had permanently lost customers" (Pet. Br. p. 19). This distinction obviously begs the question. That is the issue and precisely the determination made by the Court of Appeals here: ". . . the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [R. 101].

III.

The Court of Appeals Correctly Confirmed the Board's Test for Abolishment.

Petitioner argues that the Court of Appeals established an incorrect test for determining whether replacement has occurred by quoting out of context the language of that Court "that whether or not a vacancy exists must be determined at the time the strikers apply for work after the strike." [R. 100]. That this statement is out of context is obvious since the Court analyzed facts occurring long after August 20 in determining whether replacement occurred [R. 100].

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[4]Judge Barnes, writing for the Court, termed this "cavalier use of precedent" [R. 99] while Judge Pope, concurring, stated "Plainly the holdings in those cases precisely fit the question raised here. . . . [The company] did exactly what the Board had held it had the right to do." [R. 102].

To understand the language of the Court of Appeals, the factual context must be understood. A question of replacement will ordinarily arise only when an employer proposes to hire someone, perhaps long after the strike. But replacement does not occur when the new employee is hired—the rights of the striker were determined when he applied for work after the strike. If the striker was replaced, or his job abolished, at that point he has no preferential rights to later positions. If not, he is entitled to preference as to the new position. This is what the Court of Appeals said, and it was simply quoting the Board itself which stated in *Brown & Root, supra,* at 493 that strikers were entitled to reinstatement "only if vacancies existed at the time they properly applied for reemployment."

Once the opinion of the Court of Appeals is clearly understood, it can be seen that there is no substance to the quibbling by Petitioner with the formulation by the Court of Appeals of the test for abolishment. Petitioner itself states quite succinctly why strikers who have been replaced are not entitled to preference, *i.e.*, "the disability of the strikers . . . is essentially no different from that which any employee may incur, for there is always a risk that changes in conomic conditions or in efficiency of production may prompt the elimination of the jobs which some employees hold." (Pet. Br. p. 15). To this might be added that in labor disputes as in all other litigation, issues must at some point be laid to rest and the parties freed to go forward with the job of producing goods.

IV.

The Record Demonstrates the Fact of Replacement.

In October Fleetwood had to make, without benefit of hindsight, its decision whether the complainants had been replaced. Fleetwood had this information:

1. The strike was over two months ago;
2. It had fewer employees now than it had had at the end of the strike—71 employees at the end of the strike versus 68 employees on October 8, 1964;
3. At the end of the strike it had sufficient employees to produce approximately 15 trailers, but in October was still only producing 14 trailers; and
4. The Union had agreed to a non-preferential hiring list and was cooperating in its implementation.

The Board can point to no evidence available early in October which shows that the complainants had not been replaced. The only fact it can cite is that pre-strike production levels were achieved in late December, but this was almost five months after the strike, and almost three months after Fleetwood had to make its decision in early October.

A. The Employment Statistics Prove the Fact of Replacement.

On August 18, 1964, Fleetwood had 71 employees. On October 19, 1964, *after filling the six positions here in suit,* Fleetwood had only 74 employees. Obviously, at least three of these positions could not be new positions but must have been replacements for

other employees having left since the strike. Besides showing that at least three of the complaining parties therefore must have been replaced, this very minute increase in the total number of employees is persuasive evidence that the reduction in production was a permanent abolishment of jobs.

B. The Unit Production Figures Prove the Fact of Replacement.

On August 18, 1964, Fleetwood had 71 employees, ordinarily sufficient employees to produce approximately fifteen units per week. Fleetwood did not produce even fourteen units per week until after the first five positions here in question had been filled. Fleetwood did not increase production to sixteen units per week (the precise figure of fifteen units per week was never an established level of production) until October 25, 1964, one week after the last position here in question had been filled. Again, it is clear that where a production level consistent with the number of employees on the payroll on the date of the end of the strike was not achieved until ten days after the last position here in question was filled, the striking employees must have been replaced.

After reviewing these facts, the quotation from the *Roure-Dupont Mfg.* case is again appropriate.

> "And the record is devoid of any evidence showing that respondent's business had become sufficiently revitalized after the strike to accommodate the employees whose positions the Board finds available on February 25. On the contrary, the evidence shows that respondent had lost a substantial amount of business because of the strike and that its operations only gradually returned to

normal. Respondent is entitled to have its business condition immediately after the strike taken into consideration in connection with its obligation to reinstate strikers."

National Labor Relations Bd. v. Roure-Dupont Mfg., 199 F. 2d 631, 634.

C. That the Union Officials, Fully Informed as to the Facts, Agreed to a Non-Preferential Hiring List Is Proof of the Fact of Replacement.[5]

Fleetwood witnesses testified that the Union was fully informed of the level of production at the plant, that the company had no vacancies at the present time, that it had no plans for further hiring, and that any increase in production was speculative. Fleetwood proposed a non-preferential hiring, list, clearly predicated on the position of the company that the strikers had been replaced. The Union representatives accepted the non-preferential hiring list and cooperated in its implementation. It should be noted that the Union representatives when called as witnesses simply stated they were unable to recall the nature of the hiring list [R. 58-61]. There is not an iota of evidence in the record that Fleetwood misrepresented to the Union the conditions which prevailed on August 18, 1964.

This is persuasive evidence of the fact of replacement. The designated bargaining representative of the complainants, fully informed as to the facts, agreed to a non-preferential hiring list. It should be noted

[5]Petitioner has consistently misconstrued this argument as concerned with "waiver". Respondent is not arguing that the union business representatives did or could waive the reinstatement rights of the complainants. The point is that the union representatives, knowing full well the implications of a non-preferential hiring list, agreed to it, acknowledging that in their opinion replacement had occurred.

this is not a case of putting something over on unsophisticated working men. These arrangements were made by business representatives of the Carpenters Union, a large sophisticated organization. If they had any doubts of the fact of replacement, they would have simply insisted on making an unconditional offer to return to work and let the fact of replacement be determined later. Instead they freely acquiesced in the non-preferential arrangement, clearly acknowledging replacement.

V.

The Great Dane Case Is Not Applicable to the Present Case.

Petitioner states the issue in this case as follows:

> "The question presented here is whether an employer may properly treat the employment status of *unreplaced economic strikers* as terminated, and subsequently hire new employees in preference to them, merely because on the day that the strikers first applied for reinstatement their jobs were temporarily unavailable, the employer having reduced production because of the strike." [Emphasis added.]

It then relies upon *National Labor Relations Board v. Great Dane Trailers, Inc.* (1967), 388 U.S. 26, to establish a burden on the employer to justify failure to grant preference to strikers in this situation. Respondent freely concedes that if the complainants were "unreplaced" economic strikers, they were entitled to preference, even before *Great Dane*. It was so stipulated at trial [R. 21]. Since Petitioner seeks to apply *Great Dane* only to "unreplaced" strikers, further discussion of that case is unnecessary.

VI.

Response to Amicus Brief.

The Amicus brief forthrightly asks this Court to overrule *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333 and all the cases after it, and hold that an employer must establish a preferential hiring list whenever a striker is not immediately re-employed, regardless of whether the striker has been permanently replaced or his position permanently abolished. It admits, however, that the Board and the lower courts "without exception" for thirty years have held that no such preference for strikers is required.

First, it is submitted that discussion of this issue in this case is not proper because it is not within the scope of the question presented on petition for writ of certiorari. Sup. Ct. Rules 42(5), 40(d)(2); *Irvine v. California* (1954), 347 U.S. 128, 129; *Hebring v. Lee* (1929), 280 U.S. 111, 117. The contention of Petitioner, on which certiorari was granted, was that an employer "which at all times intended to resume full production as quickly as possible" should grant preference to strikers on post-strike job openings.[6] The

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[6]The full statements of question presented in the respective briefs were:

> "On the day a strike ended, the employer announced that, because of a reduction in production caused by the strike, no jobs were available. Two months later, the employer, which at all times intended to resume full production as quickly as possible, hired six new workers, even though there were strikers who had continually made known their desires to return to work. The question presented is whether the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by thus preferring new workers

(This footnote is continued on the next page)

contention of the Amicus, that such preference must be granted at all times under all circumstances, presents a much broader issue.

Second, the Labor Board is primarily responsible for determining the detailed rules for implementing the national labor policy. The Board did not below consider the issue raised by the Amicus, and the General Counsel for the Board has not taken a position, or offered comments here. It is submitted, therefore, that this issue should not be considered here for as this Court said in *Marine Engineers v. Interlake Co.* (1962), 370 U.S. 173, 185: "While the Board's decision is not the last word, it must assuredly be the first."

But assuming that the issue is properly before this Court, the position of the Amicus is without merit. It is conceded that it has been the rule "without exception" for thirty years that an employer is not required to grant preference to strikers who have been replaced. Reversal of this rule would mean, subject only to the statute of limitations, that every employer who has relied on existing law and hired a new employee when a striker has not been recalled would be guilty of an unfair labor practice and subject to massive back pay liability. These employers, however, have relied upon innumerable decisions by the Board and decisions of every Court of Appeals.[7] Thus, in view of this long

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over the returning striking employees." (Petition for Writ of Certiorari p. 2).

"Whether the Court of Appeals correctly determined that the Board's finding that the positions of six economic strikers had not been absorbed or abolished was not supported by substantial evidence on the record taken as a whole?" (Brief in Opposition p. 1).

[7]Since the rule is not disputed, Respondent will not discuss the cases. They are collected in BNA, *Labor Relations Reference Manual Digest* §§52.3612, 52.3614.

consistent construction, relied upon by those regulated, if there is any ambiguity as to the intent of Congress, the interpretation thereof by the Labor Board, charged with its enforcement, and the lower courts over a long period of time will not be disturbed except for very cogent and persuasive reasons. *Sanford's Estate v. Commissioner of Int. Rev.* (1939), 308 U.S. 39, 52.[8] No such cogent and persuasive reasons are shown here. The rule, while perhaps arguable as a matter of first impression, is logical and in conformity with the statute.

Logically, as the Board states, once a striker has been replaced by hiring during the strike or abolishment of his position, his "situation is essentially no different from that which any employee may incur, for there is always a risk that changes in economic conditions or in efficiency of production may prompt the elimination of the jobs which some employees hold." (Pet. Br. p. 15).

As to the statute, section 9(c)(3)[9] thereof specifically grants replaced strikers only a right to vote and then only for a limited time. This suggests very strongly that additional rights were not intended. Moreover, section 9(c)(3) expressly uses the term "entitled to reinstatement." Since under the Amicus argument, every striker would be entitled to reinstatement, the result would be to render the quoted words mere surplusage. This Court has said it will not so construe a statute. *Jerecki v. G. D. Searle & Co.* (1960), 367 U.S. 303, 307-308.

It is submitted that the Amicus brief is in error in stating that neither the 1947 or 1959 amendments nor

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[8]See Annot. 84 L. Ed. 28, 30-31.

[9]29 U.S.C. §159(c)(3).

their history show that Congress was aware of the rule that replaced employees are not entitled to preference. The rule is based on *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333 which was twice explicitly discussed. Senate Report No. 105 on S. 1126, I *Legislative History of the Labor Management Relations Act 1947,* 431 specifically states:

> "When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (*NLRB v. Mackay Radio,* 304 U.S. 333)."

Senator Pepper was critical of the Amendments on this issue, but explicitly recognized the rule:

> "That means, Mr. President, they have no right to get the job back, even if the strike be settled. The reported cited *NLRB v. Mackay Radio* (304 U.S. 333):"
>
> *Id.* Vo. 2 at 1101.

The Amicus contention contradicts the foregoing and would hold that replaced strikers have "some" right of reinstatement. Moreover, as pointed out above, both in 1947 and 1959 Congress passed amendments using the term "entitled to reinstatement" indicating knowledge of the rule and awareness that there is a distinction between replaced and unreplaced strikers.

What is sought by the Amicus is in fact a court imposed seniority agreement, and a typical clause is

even submitted. However, there is no more sensitive area in labor management relations than seniority clauses which are invariably the most carefully negotiated portions of a contract.[10] Some key issues are duration in time (few clauses are open-ended), the

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[10]BNA, *Collective Bargaining Negotiations and Contracts*, §60:1, cited by the *amicus*, summarizes the complexities well:

> "Procedures for handling force reduction are of prime importance in collective bargaining contracts, although in certain industries—notably construction—many agreements do not refer to layoff. There are conflicting interests to be reconciled here—the union's desire for maximum job protection and the employer's concern for maximum efficiency during periods of slack work.
>
> "Among contracts which refer to layoff, seniority is almost always a factor in determining the order of force reduction. In almost three cases out of four, it is the governing consideration. There is much variation, however, in the type of seniority applicable to layoff. In the automobile industry, for example, layoffs are commonly made by seniority within job classifications, whereas under many agreements the seniority unit is the department or the plant.
>
> "A further element in the degree of job security provided by a contract is whether or not 'bumping' is permitted. About 45 percent of agreements allow senior workers to claim jobs held by their juniors when their own work is suspended or abolished.
>
> "Roughly one of every two contracts provides for some type of exception to normal layoff procedures. Most often, union representatives are accorded top seniority—*i.e.*, are the last to be laid off. Some agreements permit management to retain employees whose skill and experience make them of particular importance during periods of depressed production.
>
> "Work-sharing provisions appear in about one of every five contracts. In most cases, such arrangements are intended to postpone layoffs or to furnish greater protection for workers who have been employed for a considerable period of time. A very few work-sharing plans, however, provide for division of available work among all employees, so that layoffs are avoided entirely.
>
> "In general, layoff procedures are applied in reverse when the workforce is increased. In other words, the last man laid off is the first to be rehired. Competency requirements, however, are somewhat more common in rehiring than in layoff."

group or area among which the choice is to be made, the standards to be applied (typical terms are "substantially equal", "head and shoulders above", "pure seniority," etc.). It is submitted this is not an area in which this Court should innovate without thorough briefing by all interested parties.

Wherefore, Respondent respectfully submits that the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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